

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VirnetX Inc.,

Plaintiff,

v.

Apple Inc.,

Defendant.

Civil Action No. 6:11-cv-563

Jury Trial Demanded

VirnetX Inc. and Science Applications
International Corporation,

Plaintiffs,

v.

Apple Inc.,

Defendant.

Civil Action No. 6:12-cv-855

Jury Trial Demanded

**PLAINTIFFS VIRNETX INC. AND SCIENCE APPLICATIONS INTERNATIONAL
CORPORATION'S UNOPPOSED MOTION TO CONSOLIDATE**

Pursuant to Federal Rule of Civil Procedure 42(a), Plaintiffs VirnetX, Inc. (“VirnetX”) and Science Applications International Corporation (“SAIC”) file this Motion to consolidate, for all purposes, *VirnetX, Inc. v. Apple, Inc.*, Civil Action No. 6:11-cv-563 (“the 563 case”), with *VirnetX, Inc. and Science Applications International Corporation v. Apple, Inc.*, Civil Action No. 6:12-cv-855 (“the 855 case”), both of which are pending before this Court.

VirnetX filed its Original Complaint (Dkt. No. 1) in the 563 case on November 1, 2011. Pursuant to an Order entered on December 15, 2011, the proceedings in the 563 case were stayed pending a final determination in an ITC case. *See* Dkt. No. 9. On November 6, 2012, VirnetX and SAIC filed an Original Complaint in the 855 case regarding new Apple products. VirnetX

and SAIC moved to terminate the ITC case, and on May 21, 2013, the ITC published notice that it was not reviewing the administrative law judge's termination of the ITC case. *See* "Certain Devices with Secure Communication Capabilities, Components Thereof, and Products Containing Same; Commission Determination Not to Review an Initial Determination Denying Respondent's Motion for Sanctions and Granting Complainants' Motion to Terminate the Investigation in Its Entirety; Termination of Investigation," 78 Fed. Reg. 29776-29777 (May 21, 2013). Accordingly, the ITC case is no longer pending. VirnetX and SAIC now seek to consolidate the 563 case with the 855 case.

Under Rule 42(a), a Court may consolidate actions pending before it if the actions involve a "common question of law or fact." Fed. R. Civ. Proc. 42(a). The instant actions involve common questions of both law *and* fact. Both actions assert claims for patent infringement under Title 35 of the United States Code. The patents asserted in both actions matured from a related family of applications. Moreover, VirnetX is accusing common Apple devices and instrumentalities in each action and is alleging a common course of infringing conduct by Apple. Therefore, these actions satisfy the requirement of Rule 42(a), making consolidation appropriate in this instance.

VirnetX's counsel conferred with Apple's counsel who stated that Apple does not oppose consolidation of the 563 case with the 855 case. For at least the reasons stated above, VirnetX respectfully moves this Court to consolidate the 563 case with the 855 case. Additionally, because a trial has already been set in the 855 case, VirnetX respectfully requests that upon consolidation, the 855 case be designated as the lead case.

DATED: June 12, 2013

Respectfully submitted,

McKOOL SMITH, P.C.

/s/ Jason D. Cassady

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CERTIFICATE OF SERVICE

I certify that the counsel of record who are deemed to have consented to electronic service are being served on June 12, 2013, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Jason D. Cassady
Jason D. Cassady

CERTIFICATE OF CONFERENCE

I certify that on June 7, 2013, I conferred with counsel for Apple Inc., Drew Kim, who indicated that Apple is not opposed to this Motion.

/s/ Jason D. Cassady
Jason D. Cassady